91-1351

Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

NO. 91-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF ARIZONA,

Petitioner,

-vs-

DAVID LESLEY TAYLOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the search incident to arrest exception of the Fourth Amendment apply if a police officer searches a defendant pursuant to a lawful arrest, when the police officer does not intend to make a "full-custody" arrest of the defendant but merely to issue a citation and release the defendant?

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OPINIONS BELOW

Two police officers saw respondent drinking a beer in a Tucson city park, a violation of a municipal ordinance. The officers approached respondent, intending to write a citation for the offense and thereafter release him. One of the officers searched the respondent and found "hashish" folded in a piece of paper in his wallet. (Appendix A at A-2.) The trial court denied respondent's motion to suppress, finding that the search was a lawful search incident to an arrest.

The Arizona Court of Appeals determined that the issue raised by these facts was "whether officers are free to search anyone they might arrest but have no intention of arresting under a search incident to arrest theory." It resolved the issue by holding that this Court's

cases of United States v. Robinson[1] and Gustafson v. Florida[2] controlled the issue. It held that a search incident to arrest extended only to a "custodial arrest." It found custodial arrest to be defined in Robinson as "the taking of a suspect into custody and transporting him to the police station." It found that the arresting officers in the instant case intended to cite and release respondent, therefore the rationale for a full custodial arrest as announced in Robinson was lacking. It stated that, to hold otherwise would invite "pretextual arrest and incident searches," an undesirable result under the Fourth Amendment. It therefore held that the trial court should have suppressed the evidence. (Appendix A at A-3-4.)

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1. 414 U.S. 218 (1973).

2. 414 U.S. 260 (1973).

One member of the court of appeals dissented. The dissenting judge noted that respondent was arrested for violating a section of the Tucson City Code that made possession of beer in a public park without a permit a misdemeanor offense. Under A.R.S. § 13-3883, the officers had authority to arrest the defendant. A.R.S. § 13-3903 allows a defendant who is arrested for a misdemeanor or petty offense to be released in lieu of taking such person to the police station by issuing a citation. A.R.S. § 13-3903(F) states that the cite and release provisions of § 13-3903 are not to be construed to affect a police officer's authority to conduct an otherwise lawful search incident to an arrest even though the person would be released instead of being taken to the police station. The dissent noted that it was without question that the defendant was under arrest. The

dissent disagreed that Robinson and Gustafson required anything more for a "custodial arrest." (Appendix A at A-5-7.) The state's timely petition for review was ultimately denied by the Arizona Supreme Court on November 19, 1991. (Appendix B.)

STATEMENT OF JURISDICTION

Petition for writ of certiorari to the Arizona Court of Appeals.

The Arizona Attorney General, on behalf of the State of Arizona, prays that a writ of certiorari issue to review the judgment of the Arizona Court of Appeals entered on November 20, 1990. (Appendix A.) The state's Petition for Review to the Arizona Supreme Court was ultimately denied on November 19, 1991. (Appendix B.) This petition for writ of certiorari is timely filed within 90 days of the Arizona Supreme Court's denial of the petition for review. Petitioner invokes this Court's jurisdiction under United States Constitution Article III, Section 2, 28 U.S.C. § 1257(a), and Supreme Court Rule 10.1(b) and (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent part of the Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

The pertinent part of the Fourteenth Amendment reads as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

Arizona Revised Statutes Annotated

§ 13-3883

§ 13-3903

(Attached as Appendix C.)

STATEMENT OF THE CASE

On February 12, 1989, at about 5:40 p.m., Officers Robert Jiminez and Chris Morand of the Tucson Police Department were driving in their patrol car past a park on the west side of Tucson. They both saw respondent standing in the park with his dog, talking to several youths and drinking from a can of Budweiser beer. When respondent saw the officers, he crossed his arms in front of him, attempting to hide the beer can. The officers stopped their patrol car and approached respondent. Officer Jiminez asked respondent to put down his beer can. Respondent complied. While Officer Jiminez began to write out a citation for having and consuming beer in a public park without a permit, a misdemeanor violation of the Tucson City Code, respondent's dog accidentally knocked

over the can of beer. Liquid and suds came out of the can.

Officer Jiminez informed respondent that the citation meant that respondent was under arrest, but would be released immediately upon his signing of the notice to appear. Meanwhile, Officer Morand decided to search respondent. Morand knew respondent from a previous arrest for weapons misconduct and possession of narcotics. In respondent's wallet, Officer Morand found a uniquely folded piece of paper that contained a brown substance Morand believed to be hashish. The officers immediately arrested respondent for possession of a narcotic drug. Respondent admitted to the officers that it was "hash," and a laboratory analysis confirmed that the substance was hashish, a concentrated form of marijuana in a usable amount.

Respondent was indicted for unlawful possession of a narcotic drug, a class 4

felony, in violation of A.R.S. §§ 13-3408(A)(1), (B)(1), (C) and (E). Respondent moved to suppress the hashish, arguing that the search violated both his Arizona and federal constitutional rights. The trial court found that respondent was under arrest and that the search incident to that arrest did not violate respondent's rights.

Respondent waived his jury trial and the case was tried to the court. The trial court found respondent guilty, and placed respondent on probation for 4 years and imposed a fine of $2,740.

On appeal, the Arizona Court of Appeals addressed the issue to be resolved:

> The issue raised by these facts is whether officers are free to search anyone they might arrest but have no intention of arresting under a search incident to arrest theory.

(Appendix A at A-2.) The court reasoned that, under United States v. Robinson and

Gustafson v. Florida, this Court had defined custodial arrest as "the taking of a suspect into custody and transporting him to the police station." (Appendix A at A-3.) The court held that, if the officers are going to release the person after the issuance of a citation, as was respondent in this case, there is "no justification to search." (Appendix A at A-3-4.) The basis for the court's holding was that, to allow searches when the police intend to cite and release, would "invite pretextual arrests and incident searches, with a custodial arrest to follow if something was found and release to follow otherwise."[3] (Appendix A at A-4.) The court found that the search was "unreasonable" and reversed the conviction. (Appendix A at A-4.)

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3. For support of its holding regarding pretextual arrests, the Arizona Court of Appeals cited to 2 W. LaFave, Search & Seizure § 5.2(h) (2d ed. 1987).

One member of the Arizona appellate court dissented from the majority holding.[4] The dissenting judge noted that, under Arizona law, respondent had violated a section of the Tucson City Code. Under A.R.S. § 13-3883(A)(4), a police officer may arrest a suspect without a warrant when the officer has probable cause to believe that the person has committed a misdemeanor or petty offense in the officer's presence. A.R.S. § 13-3903 allows the arresting officer, in a misdemeanor arrest situation, to "release the arrested person from custody in lieu of taking such person to the police station" by having the arrestee sign a notice to appear and complaint. A.R.S. § 13-3903(A). A.R.S. § 13-3903(F) provides that the sections are not to be construed to affect a police officer's authority to conduct a lawful

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4. The Arizona Court of Appeals is divided into various three-judge panels.

search incident to the arrest even though the arrested person is to be released before being taken to the police station or a magistrate. The dissent disagreed with the majority's interpretation of United States v. Robinson and Gustafson v. Florida. The dissent believed that a full search incident to the arrest and release situation was permissible under the Fourth Amendment. (Appendix A at A-6-7.)

On December 18, 1990, the State of Arizona filed a timely petition for review to the Arizona Supreme Court. The Arizona Supreme Court denied the petition for review on November 19, 1991.[5] (Appendix B.)

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5. The Arizona Supreme Court originally granted the state's petition for review and heard oral argument on the case. After oral argument, the Arizona Supreme Court vacated its previous order granting the petition for review and denied the petition without comment.

REASON FOR GRANTING THE WRIT

In United States v. Robinson, this Court specifically reserved ruling on the question whether the search incident to arrest doctrine applied in situations where the arresting officer intended to issue a citation and release the arrestee. Since Robinson, the various jurisdictions and legal commentators have disagreed on the applicability of the search incident to arrest doctrine to a cite and release situation. The State of Arizona requests that this Court accept the petition for certiorari, reverse the Arizona Court of Appeals, and hold that the search incident to arrest doctrine does extend to a cite and release situation, and is a "reasonable" search under the Fourth Amendment.

. . . .

. . . .

A. A search incident to arrest is a "reasonable" search under the Fourth Amendment and should apply to arrest and release situations.

In United States v. Robinson, this Court held that a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment. 414 U.S. at 235. The Court reasoned that the intrusion being lawful, the search incident to the arrest required no additional justification. Id.

> It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Id. This Court noted that it was the "fact of custodial arrest" that gave rise to the authority to search incident to that arrest. In footnote 6 of the opinion, the Court specifically declined to reach the question whether the

analysis would apply if the officer would have simply issued a notice of violation and allowed the offender to proceed. 414 U.S. at 236 n.6. In Gustafson v. Florida, issued the same day as Robinson, this Court affirmed the search incident to arrest doctrine to minor traffic violations where the arrestee was physically taken into custody. 414 U.S. at 265-66.

In his concurring opinion for both Robinson and Gustafson, Justice Powell stated:

> If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern. . . . The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest.

414 U.S. at 237-38. If the lawful arrest abates the privacy interest protected by the Fourth Amendment, Arizona believes a

search incident to the arrest is permissible whether or not the arrestee will be cited and released, or transported to the police station.

B. Jurisdictions are divided on whether a search incident to arrest applies to an arrest and release situation.

After Robinson and Gustafson, various state courts have been asked to address whether or not the search incident to arrest doctrine applies to an arrest and release situation. The jurisdictions have divided almost equally on the issue. In State v. Brantigan, 798 P.2d 1176 (Ct. App. Wash. 1990), the defendant was initially stopped for littering. In the course of running a records check on the defendant, the officer noticed drug paraphernalia in the defendant's car. Upon seeing the drug paraphernalia items, the officer told the defendant he was under arrest for possession of narcotics paraphernalia. In the course of the search, the officer discovered two

packets of cocaine in the defendant's pant's pocket. At the suppression hearing, the officer candidly admitted that he would have cited and released the defendant on the drug paraphernalia charge if he had not found the cocaine in the course of the search. The defendant contended that, to be a "reasonable" search incident to arrest, the officers must intend to execute a "custodial" arrest. 798 P.2d at 1177. The Washington Court of Appeals rejected the defendant's contention, finding that if there is probable cause to execute a misdemeanor arrest, the Fourth Amendment does not prohibit a search incident to that arrest. 798 P.2d at 1178, citing Rawlings v. Kentucky, 448 U.S. 98 (1980).

In State v. Boulia, the officer noticed two individuals appearing to be engaged in smoking marijuana. 522 So. 2d 528, 529 (Fla. App. 2d Dist. 1988). The officer approached the two individuals

BEST AVAILABLE COPY

and informed the defendant that the officer was going to cite her for possession of marijuana. The officer then searched the defendant's purse, where he found a small vial of cocaine. Whereupon, the officer made a custodial arrest for possession of cocaine. The trial court suppressed the cocaine as the fruit of an impermissible search under the Fourth Amendment. 522 So. 2d at 529. The Florida appellate court rejected the trial court's reasoning, holding that the fact that the officer "announced his intention to issue Boulia a notice to appear for the marijuana possession charge rather then effecting a full-custody arrest is of no consequence." 522 So. 2d at 530. Accord, State v. Gonzales, 562 So. 2d 705 (Fla. App. 3d Dist. 1990) (Nesbitt, J., specially concurring).

In People v. Palmer, the defendant was stopped for driving without license

plates. 22 Ill. App. 3d 866, 318 N.E.2d 206 (Ct. App. 1974). The officer approached the defendant and asked for a driver's license. When the defendant could not produce a driver's license, the officer searched him. In the course of the search, the officer discovered an illegal weapon. The defendant moved to suppress the weapon as the fruit of an illegal search incident to arrest. The Illinois intermediary appellate court ordered the evidence suppressed, finding that Robinson and Gustafson were not controlling because this was not a valid custodial arrest. Id. The State of Illinois appealed, and a divided Illinois Supreme Court reversed. People v. Palmer, 62 Ill. 2d 261, 342 N.E.2d 353, cert. denied, 429 U.S. 871 (1976). The majority of the Illinois Supreme Court held that a custodial arrest was not required. 342 N.E.2d at 354. Justice Goldenhersh dissented, claiming that

under Robinson and Gustafson a "custodial arrest" was required in order to execute a search incident to arrest. 342 N.E.2d at 355-56. But cf. State v. King, 142 Wis. 2d 207, 418 N.W.2d 11 (Ct. App. 1987) (no distinction between "custodial" and "noncustodial" arrests).

The Arizona Court of Appeals reversed the present case on the theory that, under Robinson and Gustafson, a search incident to arrest under the Fourth Amendment is permissible only when the officers make a "custodial arrest." (Appendix A at A-4.) Other courts asked to address the issue specifically left open in Robinson have reached results consistent with the Arizona Court of Appeals. Thomas v. State, 453 So. 2d 1075 (Ala. Cr. App. 1984) (noncustodial arrest does not give rise to a search incident to arrest); State v. Clyne, 189 Colo. 412, 541 P.2d 71 (1975) (search incident to arrest does not apply to

non-custodial arrests); but cf. People v. Meredith, 763 P.2d 562 (Colo. 1988) (limited holding in Clyne to detention for issuance of a summons); State v. Breax, 329 So. 2d 696 (La. 1976) (Robinson and Gustafson limited to a full-custody arrest); 2 W. LaFave and J. Israel, Criminal Procedure § 12.5(b) at 152-53. The State of Arizona requests that this Court grant the petition for certiorari to resolve whether the search incident to arrest exception to the Fourth Amendment is applicable to cite and release arrests.

C. The universal safety and protection of law enforcement personnel requires that this Court hold that a search incident to arrest applies to arrest and release situations.

In rejecting the contention that Terry v. Ohio[6] required that an officer have probable cause to search incident to a

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6. 392 U.S. 1 (1968).

custodial arrest, this Court noted in Robinson that there was no support for the assumption that persons arrested for minor offenses were less likely to possess dangerous weapons than those arrested for major crimes. 414 U.S. at 234. The Court noted that the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest. 414 U.S. at 234 n.5. As Justice Powell noted in his concurring opinion, the arrest itself invades the privacy interest guarded by the Fourth Amendment. 414 U.S. at 237. If the arrest is lawful, then no reason exists to frustrate law enforcement by requiring some independent justification for a search incident to that lawful arrest. Id.

In Arizona, before a person may be released pursuant to a cite and release procedure, the arrestee must produce

proper identification, the officers must run a warrant check and assess the arrestee's demeanor and behavior, and the arrestee must sign the citation agreeing to appear at the court proceedings. The investigation may take a few minutes or few hours, and may occur in a myriad of circumstances. It is not until after the officer completes the investigation and evaluates all of the dynamic circumstances that the officer can and does make the final decision whether or not to release the arrestee. Therefore, to require, as does the Arizona Court of Appeals' decision and those other jurisdictions that subscribe to its reasoning, that the officer must determine at the inception of the arrest for a petty or misdemeanor offense whether the arrestee will be field released or transported to the station, turns law enforcement decision making on its head. It asks the officer to make a

discretionary decision whether to arrest and transport or arrest and release before the facts and circumstances on which the decision is based are known. This requirement risks the officer's physical safety and the destruction of evidence while a full investigation is undertaken. By requiring that the officers may not engage in a full search of the defendant unless the defendant is to be transported to the station, the Arizona Court of Appeals requires law enforcement officers to conduct a more intrusive procedure in order to justify a less intrusive one. Cf. California v. Acevedo, ___ U.S. ___, 111 S. Ct. 1982, 1989 (1991) (Court sees no "benefit of a rule that requires law enforcement officers to conduct a more intrusive search in order to justify a less intrusive one").

The only basis proffered by the state courts in rejecting the search incident

to arrest exception to cite and release arrests is the notion that it would encourage pretextual searches. (Appendix A at A-4.) However, the very concept of pretextual searches has been repudiated by this Court. United States v. Scott, 436 U.S. 128 (1978).

> [T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action so long as the circumstances, viewed objectively, justify that action.

436 U.S. at 138.

The issue has never been disputed that the officers in the instant case had probable cause to arrest respondent for drinking alcohol in a public park without a permit. At the suppression hearing, the officer testified that, based on departmental police instructions that he could search incident to a misdemeanor arrest, he engaged in such a search.

There is nothing in the record that would evidence that this was a "pretextual" search. Moreover, as this Court noted in Scott, the subjective basis upon which an officer acts is irrelevant so long as the objective factors involved clearly justify the officer's action. 436 U.S. at 138.

. . . .

. . . .

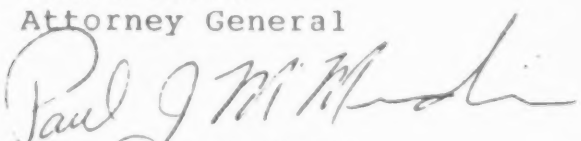
CONCLUSION

The State of Arizona prays that this Court will accept the petition for certiorari and resolve the issue of the extent of the search incident to arrest exception to the Fourth Amendment and hold that a search incident to arrest is "reasonable" in cite and release situations. The state believes that such a holding is consistent with the principles enunciated in United States v. Robinson and Gustafson v. Florida, and that the Arizona Court of Appeals and the other states that have so limited the exception under the Fourth Amendment are without justification.

DATED this 14th day of February, 1992.

Respectfully submitted,

GRANT WOODS
Attorney General



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THREE COPIES of this Brief were deposited for mailing this 14th day of February, 1992, to:

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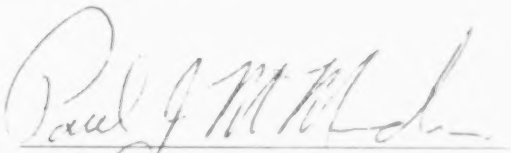

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APPENDICES

APPENDIX A

[Filed November 20, 1990]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee,	)	
v.	)	2 CA-CR 89-0648
DAVID L. TAYLOR, Appellant.	)	DEPARTMENT A
	)	O P I N I O N

APPEAL FROM THE SUPERIOR COURT
OF PIMA COUNTY

Cause No. CR-26862

Honorable William N. Sherrill, Judge

REVERSED

Robert K. Corbin, The Attorney General
by Jessica Gifford Funkhouser and
Eric A. Bryant Phoenix

Attorneys for Appellee

Susan A. Kettlewell, Pima County Public Defender
by Nancy F. Jones Tucson

Attorneys for Appellant

L I V E R M O R E, Presiding Judge.

On February 12, 1989, two police officers saw defendant drinking a beer in a Tucson city park, a violation of a municipal ordinance. They approached him intending to write a citation for that offense. One of the officers searched defendant and found hashish folded in a paper in his billfold. Had that hashish not been found, both officers agree, defendant would have been free to leave.[1/] The issue raised by these facts is whether officers are free to search anyone they might arrest but have no intention of arresting under a search incident to arrest theory. We believe they may not. Accordingly, we reverse defendant's conviction for possession of hashish.

1/ Both officers also agreed that they had no reason to believe defendant armed or dangerous. We need not address, therefore, the circumstances under which a protective search for weapons might be undertaken. Such a search, of course, could not extend to examining the compartments of a billfold.

In United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), and Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973), the court upheld a full search of the person being arrested incident to that arrest. When custodial arrest, defined in Robinson as "the taking of a suspect into custody and transporting him to the police station," 414 U.S. at 235, 94 S.Ct. at 476, 38 L.Ed.2d at 440, is in issue, that search for weapons and destructible evidence is authorized, even without reason to believe that either would be present, in part because the arrest itself would create a motivation to use a weapon or destroy evidence. That rationale cannot apply when a person is not being taken into custody to be booked for an offense. If a person is to be free to leave, as defendant was to be in this case, there is no motivation to destroy evidence. In turn, there is no

justification to search for it. We are cited no authority for the proposition that police are free to search anyone they choose to cite for a misdemeanor offense or that they could arrest although they do not intend to. It would be obviously destructive of the privacy of many if police could justify searches on the basis of charges they never intended to pursue in the hope that the search would turn up something they could pursue. That would invite pretextual arrests and incident searches, with a custodial arrest to follow if something was found and release to follow otherwise. See generally 2 W. LaFave, Search & Seizure § 5.2(h), (2d ed. 1987). But a search must be justified at its inception, not by what it turns up. There being no probable cause to search, no reason to believe that defendant was armed or dangerous, and no compelling law enforcement interest, only curiosity,

being served, the search in this case was unreasonable. The hashish thereby discovered must be suppressed.

Reversed.

/S/
JOSEPH M. LIVERMORE,
Presiding Judge

CONCURRING:

/S/
MICHAEL A. LACAGNINA, Judge

H A T H A W A Y, J., Dissenting.

Appellant was arrested under the section of the Tucson Code which makes an unpermitted possession of beer in a public park a misdemeanor. Tucson Code §§ 21-7, -8 (1987). Also, A.R.S. § 4-244(20) prohibits beer consumption from a broken package in a public place.

A.R.S. § 13-3883(4) permits a police officer, without a warrant, to arrest someone whom the officer has probable cause to believe has committed a misdemeanor or petty offense. The

statute also permits immediate release under § 13-3903, which provides that when a person is arrested for a misdemeanor or petty offense, "the arresting officer may release the arrested person from custody in lieu of taking such person to the police station by use of the procedure prescribed in this section, . . ." i.e., the signing of the notice to appear and complaint. A.R.S. § 13-3903(A). A.R.S. § 13-3903(F) states that "[n]othing in this section shall be construed to affect a police officer's authority to conduct an otherwise lawful search incident to his arrest even though such arrested person is released before being taken to the police station or before a magistrate pursuant to this section."

A.R.S. § 13-3881(A) provides that an arrest is "actual restraint of the person to be arrested," or "submission to the custody" of the officer. It is clear that under the facts of this case

appellant was arrested and in custody when he was searched. No person in appellant's circumstance would have believed that he was free to leave at that time. State v. Ault, 150 Ariz. 459, 464, 724 P.2d 545, 550 (1986). Accordingly, a full search incident to a custodial arrest was reasonable under the Fourth Amendment. United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973). Also see, State v. Magness, 115 Ariz. 317, 321, 565 P.2d 194, 198 (App. 1977).

The sitution [sic] is similar to State v. Susko, 114 Ariz. 547, 562 P.2d 720 (1977), where the defendant was stopped for not having a properly licensed motorcycle. The incidental search turned up a stolen wallet with credit card. The search was upheld as permissible incident

to arrest. In my opinion, the conviction should be affirmed.

/S/
JAMES D. HATHAWAY, Judge

APPENDIX B

[Filed November 19, 1991]

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Supreme Court
	)	No. CR-91-0012-PR
Appellee,	)	
	)	Court of Appeals
vs.	)	No. 2 CA-CR 89-0648
	)	
DAVID L. TAYLOR,	)	Pima County
	)	No. CR-26862
Appellant.	)	
	)	O R D E R
	)	

ORDERED: Vacating order previously entered granting petition for review as having been improvidently granted.

FURTHER ORDERED: Petition for Review is DENIED.

DATED this 19th day of November, 1991.

/S/
FRANK X. GORDON, JR.
Chief Justice

TO:
Hon. Grant Woods, Attorney General
ATTN: Paul J. McMurdie, Esq. and
Ronald L. Crismon, Esq.,
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APPENDIX C

Arizona Revised Statutes Annotated

§ 13-3883. Arrest by officer without warrant

A. A peace officer may, without a warrant, arrest a person if he has probable cause to believe:

1. A felony has been committed and probable cause to believe the person to be arrested has committed the felony.

2. A misdemeanor has been committed in his presence and probable cause to believe the person to be arrested has committed the offense.

3. The person to be arrested has been involved in a traffic accident and violated any criminal section of title 28, and that such violation occurred prior to or immediately following such traffic accident.

4. A misdemeanor or a petty offense has been committed and probable cause to believe the person to be arrested has committed the offense. A person arrested

under this paragraph is eligible for release under § 13-3903.

B. A peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence and may serve a copy of the traffic complaint for any alleged civil or criminal traffic violation. A peace officer who serves a copy of the traffic complaint shall do so within a reasonable time of the alleged criminal or civil traffic violation.

§ 13-3903. Notice to appear and complaint

A. In any case in which a person is arrested for an offense that is a misdemeanor or a petty offense, the arresting officer may release the arrested person from custody in lieu of taking such person to the police station

by use of the procedure prescribed in this section.

B. At any time after taking a person arrested for an offense that is a misdemeanor or a petty offense to the police station, the arresting officer may, instead of taking such person to a magistrate, release such person from further custody by use of the procedure prescribed in this section.

C. In any case in which a person is arrested for an offense that is a misdemeanor or a petty offense, the arresting officer may prepare in quadruplicate a written notice to appear and complaint, containing the name and address of such person, the offense charged, and the time and place where and when such person shall appear in court, provided:

1. The time specified in the notice to appear is at least five days after arrest.

2. The place specified in the notice shall be the court specified in § 13-3898.

3. The arrested person, in order to secure release as provided in this section, shall give his written promise so to appear in court by signing at least one copy of the written notice and complaint prepared by the arresting officer. The officer shall deliver a copy of the notice and complaint to the person promising to appear. Thereupon, the officer shall forthwith release the person arrested from custody.

4. The officer shall, as soon as practical, deliver the original notice and complaint to the magistrate specified therein. Thereupon, the magistrate shall promptly file the notice and complaint and enter it into the docket of the court.

D. The Arizona traffic ticket and complaint may be utilized not only for the purposes provided in the Arizona

supreme court rule, but to satisfy the requirements of this section.

E. When a person has given his written promise to appear in court upon a designated date pursuant to this section, and thereafter fails to appear, personally or by counsel, on or before that date, the magistrate shall file a complaint, in writing, under oath, setting forth the offense of wilfully violating a written promise to appear in court in accordance with § 13-3904, and shall issue a warrant of arrest thereon. Upon such person's appearance in court for arraignment on the charge of violating § 13-3904, such magistrate shall also arraign such person on the charge stated in the notice to appear and complaint for which such person had previously promised to appear.

F. Nothing in this section shall be construed to affect a peace officer's

authority to conduct an otherwise lawful search incident to his arrest even though such arrested person is released before being taken to the police station or before a magistrate pursuant to this section.

ORIGINAL (2)

Supreme Court, U.S.
FILED
MAR 20 1992
OFFICE OF THE CLERK

No. 91-1351

IN THE
SUPREME COURT OF THE UNITED STATES

Ooctober Term, 1991

STATE OF ARIZONA,

Petitioner,

vs.

DAVID L. TAYLOR,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the search incident to arrest exception to the Fourth Amendment permit a full search of the person where the person searched has been detained solely to issue a misdemeanor citation in lieu of a physical arrest?

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No. 91-1351

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF ARIZONA,

Petitioner,

vs.

DAVID LESLEY TAYLOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, David Lesley Taylor, respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the decision of the Arizona Court of Appeals entered on November 20, 1990.

OPINION BELOW

Respondent David Lesley Taylor filed an appeal to the Arizona Court of Appeals for Division Two following conviction of the charge of unlawful possession of hashish. The issue appealed was the denial of his motion to suppress the evidence obtained in violation of his rights under the Fourth Amendment to the United States Constitution as well as his rights under the State

Constitution. The facts giving rise to the motion to suppress, as outlined by the Arizona Court of Appeals, are as follows. On February 12, 1989, two police officers saw respondent drinking a beer in a Tucson city park, a violation of a municipal ordinance. They approached him intending to write a citation for that offense. One of the officers searched respondent and found hashish folded in a paper in his billfold. Had that hashish not been found, both officers agreed that respondent would have been free to leave. In addition, both officers agreed that they had no reason to believe respondent was armed or dangerous.

The court framed the issue raised by the facts as "whether officers are free to search anyone they might arrest but have no intention of arresting under a search incident to arrest theory." (Petitioner's Appendix A at A-2). The court then based its decision on the rulings of this Court in United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed. 2d. 427 (1973), and Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed. 2d. 456 (1973). The court stated that under Robinson a full search of the person incident to a custodial arrest, defined in Robinson as "the taking of a suspect into custody and transporting him to the police station," 414 U.S. at 235, is authorized, even without reason to believe that weapons or destructible evidence would be present, in part because the arrest itself would create a motivation to use a weapon or destroy evidence. The court then reasoned that that rationale cannot apply when a person is not being taken into custody to be

booked for an offense and that nothing in Robinson or any other authority cited by the State supported the proposition that police are "free to search anyone they choose to cite for a misdemeanor or that they could arrest although they do not intend to." (Petitioner's Appendix A at A-4). Although not the basis for its holding, the court also expressed its concern that such a proposition would invite pretextual arrests and incident searches, citing to 2 W. LaFave, Search & Seizure §5.2(h)(2d. ed. 1987), as well as its concern that in the present case the only law enforcement interest being served was curiosity. As the search was not justified as a search incident to arrest or any other basis, the court found the search to be unreasonable and ruled that the hashish thereby discovered must be suppressed. (Petitioner's Appendix A at A-4 to A-5).

STATEMENT OF JURISDICTION

As set forth by Petitioner, this Court has jurisdiction under United States Constitution Article III, Section 2 and 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated . . . .

The pertinent part of the Fourteenth Amendment reads as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On February 12, 1989, at about 5:40 p.m., Officers Robert Jimenez and Chris Morand of the Tucson Police Department were driving by a city park when they observed respondent David L. Taylor talking to some youngsters and holding a can of beer. Respondent also had a small dog on a leash with him. Officer Jimenez walked up to respondent and saw that the can was a can of Budweiser beer and that it was open. He asked respondent to put the can down, and respondent complied. Officer Jimenez then issued a citation to respondent for having an open can of beer in the park without a malt beverage permit, a violation of the Tucson City Code. Officer Jimenez advised respondent that he was under arrest when he was issuing the citation. However, he was intending that respondent sign the citation with a promise to appear later in court and then let him go on his way. After Officer Morand saw Officer Jimenez writing out the citation, he conducted a full search of respondent. He found a white folded piece of paper in respondent's wallet containing a brown substance which he believed to be hashish. Neither officer saw any bulges or had any reason to believe that respondent had any weapons or an illegal substance on his person, and the search was not motivated by any belief that respondent had any alcohol or weapons. The search was thus not a pat down search for weapons but rather a full search according to Officer Morand, to "see what he might find," not related to the offense for which the citation was issued. Officer Morand conducted the search to

check for anything of evidentiary nature. He was not simply looking for identification as Officer Jimenez was already issuing a citation with that information. He stated that in the situation where a citation was being issued, police policy gave the officer the discretion as to whether or not to conduct a full search incident to arrest. Officer Morand had made approximately 200 "arrests" for similar type offenses, and had conducted full searches incident to those arrests in approximately one-half of those cases. In those cases where he did conduct a search, he had a basis. In this case his reason for conducting the search was that he had arrested respondent in the past for concealed weapons and narcotics. The intent of both officers was simply to cite respondent and release him and Officer Jimenez would have done so had Officer Morand not found the hashish in respondent's wallet. It was at that point that respondent was handcuffed and placed in the police car. He was then advised of his Miranda[1] rights. Respondent was cooperative at all times. Respondent moved to suppress the hashish on the grounds that the search was invalid under the Fourth Amendment to the United States Constitution and the Arizona Constitution. The motion was denied on the basis that it was a valid search incident to arrest.

Respondent was subsequently convicted of unlawful possession of a narcotic drug. He appealed and the Arizona Court of Appeals reversed his conviction on the basis that the search was invalid under the Fourth Amendment. The State of Arizona filed a

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[1]Miranda v. Arizona, 384 U.S. 436 (1966)

Petition for Review by the Arizona Supreme Court, which was granted but subsequently denied after oral argument as improvidently granted.

REASONS FOR DENYING THE WRIT

A. The Search Incident to Arrest Exception Only Applies to Custodial Arrests; As There Was No Custodial Arrest in this Case, the Opinion Below Correctly Held the Search to be Unreasonable.

In United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed. 2d 427 (1973), this Court stated:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

414 U.S. at 235. The Court emphasized that it is "the fact of custodial arrest which gives rise to the authority to search." 414 U.S. at 236. In a footnote, the Court noted that it was not reaching the question discussed by the Court of Appeals as to what police action was authorized where the officer would simply issue a notice of violation and allow the offender to proceed, which the lower court had found to be analogous to the authority in a Terry-stop situation.[2] 414 U.S. at 236, n.6. However,

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[2] Terry v. Ohio, 392 U.S. 1 (1968).

nothing in the footnote suggests this Court would have considered a cite and release situation to be equivalent to a full-custody arrest as occurred in both Robinson and Gustafson v. Florida, 414 U.S. 260, 265-266, 94 S.Ct. 488, 38 L.Ed. 2d. 456 (1973).[3] In fact, as discussed below, this Court's emphasis upon the dangers inherent in the extended exposure following taking a suspect into custody and transporting him "strongly suggests agreement with the court of appeals disposition." 1 W. LaFave and J. Israel, Criminal Procedure §3.5 at 249 (1984).

The State argues that the opinion below is incorrect because under the majority decision in Robinson as well as the concurring opinion of Justice Powell, it is the fact of a lawful arrest which establishes the right to search and that once a lawful arrest occurs the privacy interest of the Fourth Amendment has been abated to a legitimate governmental concern. Therefore, Petitioner argues, "if the lawful arrest abates the privacy interest protected by the Fourth Amendment, Arizona believes a search incident to the arrest is permissible whether or not the arrestee will be cited and released, or transported to the police station. (Petition for Writ of Certiorari at 15-16). However, Petitioner in its argument has ignored the language contained in both the opinion and the concurring opinion, in discussing the fact that it is a lawful arrest which establishes the authority

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[3]As conceded by Petitioner, Gustafson involved a search incident to an arrest on minor traffic violations where the arrestee was physically taken into custody, thus acknowledging the distinction between physical custody and detention.

to search since in both instances the language is proceeded or followed by the term "custodial arrest." In other words, in Subsection A of its argument, going to the merits of the decision below, the State argues that the search incident to arrest exception should apply to a "cite and release" situation, but offers no rationale supported by a legal analysis for doing so.

The Arizona Court of Appeals was correct in holding that the rationale behind the Robinson exception simply does not apply to the facts of this case. As set out in the decision below, under Robinson a search for weapons and destructible evidence is authorized, even without reason to believe that either would be present, in part because the custodial arrest itself would create a motivation to use a weapon or destroy evidence. See Robinson, 414 U.S. at 234; Petitioner's Appendix A at A-3. In addition, the primary rationale for the search incident to arrest exception as expressed in Robinson is that "the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the relatively fleeting contact resulting from the typical Terry-type stop." 414 U.S. at 234-235.

Here, there was no extended exposure to justify the search under the above rationale nor any motivation for evidence to be destroyed absent a custodial arrest. Assuming an arrest, respondent was never "in custody" for purposes of Robinson. Rather, the facts in this case reveal all of the noncoercive aspects similar to an ordinary traffic stop which does not

involve custody. See Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed. 2d. 317 (1984) (discussing custody for purposes of Miranda warnings). Custody for purposes of Miranda is determined by inquiring whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Berkemer, 468 U.S. at 422. Thus, similar factors govern determination of custody for purposes of a search incident to a custodial arrest. In Berkemer this Court considered a traffic stop as being more like a Terry-type detention than an arrest as it was a minimal intrusion. This Court found the stop not to constitute custody for purposes of Miranda, because of the noncoercive aspect of the ordinary traffic stop. The facts relied upon were that the stop was brief, at no time was the person informed that his detention would not be temporary, the stop was public, and the motorist is typically confronted by at most two policemen, giving it a non-coercive atmosphere.

Here, as in Berkemer, respondent was not at any time between the approach of the officers and the arrest for possession of hashish "subjected to restraints comparable to those associated with a formal arrest." 468 U.S. at 422. As in Berkemer, the detention to issue the citation was brief, the interaction occurred in a public place in front of other park visitors, only two officers approached respondent, respondent was never informed that his detention would not be temporary and in fact he would have reasonably believed from the issuance of the citation that it was entirely temporary. A decision had been made that

respondent was not going to be booked for having an open container of beer in a public park. For all of the above reasons, respondent had not been subjected to a custodial arrest at the time of the search. Therefore, the Court of Appeals correctly held that the search was not valid as a search incident to arrest under Robinson. See 1 W. LaFave and J. Israel, Criminal Procedure §3.5, 248-249 (1984)("custodial arrest" is seizure of the person with the intention of thereafter having him transported to the police station or other place to be dealt with according to law). The dissenting opinion's reliance on Arizona statutes which refer to a citation for a misdemeanor situation as an arrest and subsequent release from custody is unwarranted as a State cannot by statute define a custodial arrest for purposes of Robinson without regard to the Fourth Amendment and its application to the facts of this case. Cf. State v. Martin, 253 NW 2d 404, 406 (Minn. 1977).

As there had not been a lawful custodial arrest at the time of the search, the warrantless search of respondent's person was not justified as a search incident to arrest under Robinson and therefore the Court of Appeals correctly found that the search was unreasonable. Therefore, as the opinion below was correctly decided, the Petition for Writ of Certiorari should be denied.

B. The Purported Conflict Between State Jurisdictions As to Whether The Search Incident to Arrest Exception Applies to a Citation and Release Situation is Illusory.

In part B of its argument as well as in its introductory argument as to why the writ should be granted, Petitioner, the State of Arizona, contends that "[s]ince Robinson, the various jurisdictions and legal commentators have disagreed on the applicability of the search incident to arrest doctrine to a cite and release situation." Petition for Writ of Certiorari at 13, 16. The above statement is unsupported and the purported conflict between the state courts is illusory. For example, the State of Arizona has only referred to one legal commentator, 2 W. LaFave and J. Israel, Criminal Procedure §12.5(b) (1984) at 152-153, who states that under Robinson a search incident to arrest may not be conducted where the officer simply issues a notice of violation and allows the offender to proceed. See also Criminal Procedure, supra, §3.5, at 248-249.

Second, the Petitioner states that the jurisdictions have divided almost equally on the issue, citing decisions in support of both sides. However, a closer look at the cases cited to support the State of Arizona's position shows that this is in fact not the case. In State v. Brantigan, 798 P.2d 1176 (Ct. App. Wash. 1990), the court upheld a search of a suspect arrested for the misdemeanor of possession of narcotics paraphernalia. However, in that case the defendant in moving to suppress relied solely on the after the fact expressed subjective intent of the officer that if he had not found the cocaine he would have

released the defendant on the paraphernalia charge. The Washington court distinguished the case from State v. Carner, 624 P.2d 204 (1981) in which a final search conducted after the decision to release the defendant was made was held to be invalid. Thus taking Brantigan, together with Carner, under the Washington state courts interpretation of the search incident to arrest exception the search in this case, where the decision to issue a citation and release respondent had been made prior to the search, would be held unreasonable. The court's holding that the officer's subjective state of mind is irrelevant is not inconsistent with the correct interpretation of Robinson that the exception does not apply where the officer simply issues a notice of violation and allows the offender to proceed.

In addition, the court's statement that it was controlled by Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed. 2d. 633 (1980) further demonstrates that the court was not addressing the issue of whether a search incident to arrest is authorized under Robinson when the officer decides to cite and release the defendant prior to the search. In Rawlings, the police had probable cause to place the suspect under arrest on felony charges and there was no question in that case that the suspect was to be arrested and taken into custody. 448 U.S. at 111. Thus, this Court held that "[w]here the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the

search preceded the arrest rather than vice versa." Id.[4]

The State also cites two cases from Florida, State v. Boulia, 522 So. 2d. 528 (Fla. App. 2d. Dist. 1988) and State v. Gonzales, 562 So.2d 705 (Fla. App. 3d. Dist. 1990)(Nesbitt, J., specially concurring). However, in Boulia the court upheld the search at issue, but did so, as in Brantigan without reaching the question concerning the permissible scope of a search incident to arrest when a notice to appear in lieu of a physical arrest is utilized by the arresting officer. 522 So.2d at 530. Again, the court merely found that the officer's after the fact subjective intent was held not dispositive. Gonzales, supra, was decided on the basis of a valid search for weapons; the Petitioner's reference to the concurring opinion does not provide a conflict among the jurisdictions. See also footnote 4.

People v. Palmer, 342 NE 2d. 352 (Ill. 1976), an Illinois decision, upheld a search without any reference to Robinson or any discussion of the cite and release situation. See 342 NE 2d. at 354; see also 342 NE 2d. at 356 (Goldenhersh, J., dissenting). Rather, the defendant's argument appeared to be based primarily on the absence of facts to conduct a pat down for weapons. 342 NE 2d at 354, and the court upheld the search on the grounds that "the decisions of this Court have consistently held that the

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[4]A similar reliance on Rawlings, supra, in State v. Boulia, 522 So. 2d 528 (Fla. App. 2d. Dist. 1988) and the concurring opinion in State v. Gonzales, 562 So. 2d 705 (Fla. App. 3d. Dist. 1990) shows the focus of those opinions was not on the more narrow question presented here of the authority to search where there is a predetermined decision to cite and release the suspect.

absence of license plates suggests a serious violation of the law which justifies a search." Id. In State v. King, 142 Wis. 2d. 207, 418 NW 2d 11 (Ct. App. 1987), which the Petitioner refers to as finding no distinction between a custodial and a noncustodial arrest, the distinction between custodial arrest and noncustodial arrest raised by the defendant was in the context of his argument under applicable statutes that there was no authority to take him into custody on civil violations. 418 NW 2d. at 13. King was searched for weapons prior to being transported to the station to post bond. The court blankly stated that he was lawfully arrested for the two traffic tickets and that the search of his person was not unconstitutional. Id. The issue of whether the search incident to arrest exception under Robinson applies to a cite and release situation was not addressed.

Unlike the cases cited by the Petitioner as allowing search incident to any "arrest" including the cite and release situation, the cases it cites as arriving at the opposite conclusion do address the issue. For instance, State v. Breaux, 329 So. 2d 696 (La. 1976) is directly on point on the issue raised by the facts of the instant case, i.e., whether a temporary detention of a person for purposes of issuing a summons, in that case for a traffic offense, justifies without more reason, a full search of his person. 329 So. 2d. at 698. The court interpreted Robinson to authorize a search incident to arrest only when there has been a full-custody arrest reasonably made for the purpose of booking the person. 329 So. 2d at 699.

In addition, the court found that no custodial arrest had occurred, rather, "the only police officer who had probable cause to make an arrest, had already determined instead to issue a summons (ticket) for the traffic offense..." 329 So. 2d at 699. The court thus held that under both the federal constitution and the state constitution the search was invalid as there had been no custodial arrest. 329 So. 2d at 700. The other cases cited as reaching results consistent with the Arizona Court of Appeals also address the issue of the application of the search incident to arrest exception to noncustodial arrest. (Petition for Writ of Certiorari at 20-21) See also State v. Davis, 477 So. 2d 504 (Ct. Cr. App. Ala. 1985)(under Robinson there is no authority for a full search absent the fact of a lawful custodial arrest); State v. Darrah, 64 Ohio St. 2d. 22, 412 NE 2d. 1328, 1331 (1980) (receipt of traffic citation is not functional equivalent of arrest); United States v. Suarez, 694 F. Supp. 926, 937 (U.S.D. Ct. S.D. Ga. 1988) (because traffic stops are typically non-custodial, the officer lacks the authority to search pursuant to Robinson); People v. Klein, 115 Ill. App. 3d. 582, 450 NE 2d. 1268, 1271 (1983)(warrantless search of accused is proper where a custodial arrest is actually made; whether or not a custodial arrest is made depends not on the label attached to police action, but on the degree of intrusion made upon interests protected by the Fourth Amendment).

The Petitioner's argument that there is a division in the state jurisdictions on whether a search incident to arrest

exception applies to a cite and release situation, especially under the narrow facts of this case, is illusory and thus resolution of the issue is not a significant reason for this Court to grant the petition. Therefore, the Petition for Writ of Certiorari should be denied.

C. The Petitioner Has Overstated the Importance of the Arizona Court of Appeals' Holding, As the Issue is Narrow and Interests of Officer Safety Are Fully Protected.

Petitioner argues that the Arizona Court of Appeals' decision requires that the officer must determine at the inception of an arrest for a petty or misdemeanor offense whether the arrestee will be field released or transported to the station and that this requirement seriously interferes with police safety and authority to investigate. (Petition for Writ of Certiorari at 22-24). This argument is wholly specious. First, the decision below does not make any such requirement; rather, it only found that once the officer had decided to cite and release the suspect, a search was not justified[5]. (See Petitioner's Appendix A at A-2). Compare State v. Calabrese, 157 Ariz. 189, 755 P.2d. 1177 (App. 1988). Thus Petitioner's argument that an officer needs sufficient time to complete the investigation and evaluate the dynamic circumstances prior to deciding whether or not to release the suspect is not impeded whatsoever by the decision below. With regard to officer safety, those concerns are fully met by the officer's authority to do a pat down search for weapons where justified. See Terry v. Ohio, supra. The only limitation on the officer's authority under the decision below is that the officer is not free to do a full search of a person to look for items of evidentiary value not connected to the

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[5]Petitioner's statement that in Arizona before a person may be released pursuant to a cite and release procedure, the officers must run a warrant check is not supported by anything in the record.

misdemeanor for which the suspect has been detained prior to making a custodial arrest. However, this limitation is nothing new but is premised on the entire development of fourth amendment doctrine. What the State seeks is to be able to search a person detained for a misdemeanor to see what evidence might be on their person as part of its investigation in determining whether to cite and release or take that person into custody, when there is no legitimate interest at that time for such a search.

Petitioner argues further that by requiring that the officers may not engage in a full search of the defendant unless the defendant is to be transported to the station, the "Arizona Court of Appeals requires law enforcement officers to conduct a more intrusive procedure in order to justify a less intrusive one," citing California v. Acevedo; ____U.S.___, 111 S.Ct. 1982, 114 L.Ed. 2d. 619 (1991). (Petition for Writ at 24) It is not the Arizona Court of Appeals reasoning that is backwards, but rather Petitioner's. In California v. Acevedo, this Court held that it made no sense to allow the police to search an automobile when there was probable cause to do so but to require a search warrant for a container in a vehicle for which they have probable cause to search merely because they lack probable cause to search the entire car. 114 L.Ed. 2d. at 630-631. In that context this Court also said that requiring officers who had probable cause to search the vehicle to in fact search the entire vehicle when they otherwise would choose only to search packages inside the vehicle was senseless as there was no benefit of a rule that requires law

enforcement officers to conduct a more intrusive search in order to justify a less intrusive one. 114 L.Ed. 2d. at 631. In Acevedo, the officers had a basis for both searches, i.e., probable cause. Here, the Petitioner's argument that to require the police to take an arrestee into custody in order that they may conduct a full search of the person requires police to conduct a more intrusive procedure in order to justify a less intrusive one is premised on the faulty proposition that they have a right to search the person absent a custodial arrest. What the Petitioner is actually proposing is that the Court of Appeals' decision will force the police to make pretextual custodial arrests solely in order to provide a justification to search for evidence. Should such police conduct in fact result from the Court of Appeals' adherence in this case to Robinson and established fourth amendment principles, then the issue of pretext custodial arrests may have to be litigated. However that is not the issue presented in this case.[6] As discussed in Argument A, supra, there were no objective factors which clearly justified the officer's action and the decision below rests upon Robinson not on a finding of a pretextual arrest.

The Petitioner has overstated the importance of the Arizona

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[6]The Petitioner has incorrectly stated the basis of the Court of Appeals decision was to prevent pretext arrests. Petition for Writ of Certiorari at 10, 24-25. While this was not the basis for the Court's holding, Respondent would point out that Petitioner's assertion that there is nothing in the record that would show a pretextual search in this case is incorrect; Officer Morand only searched respondent because he hoped to find evidence of other offenses. See Statement of the Case, supra at 6.

Court of Appeals' holding. The issue decided is very narrow and does not have the effect of interfering with interests of law enforcement in investigation and officer safety. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Arizona Court of Appeals correctly interpreted this Court's decision in United States v. Robinson in ordering that the motion to suppress be granted. Additionally, the purported conflict between jurisdictions and commentators is illusory and the Petitioner has overstated the importance of the holding below and the need for this Court to grant the Petition for the universal safety and protection of law enforcement personnel. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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) ss.
County of Pima)

DONALD S. KLEIN, a member of the bar of this Court, being duly sworn upon oath, deposes and says: that he served three (3) copies of the Response to Petition for Writ upon

Paul J. McMurdie
Assistant Attorney General
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1275 West Washington
Phoenix, Arizona 85007

by depositing the same in the United States mail, with first class postage prepaid.

DATED this 28th day of March, 1992.

Donald S. Klein

DONALD S. KLEIN
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this 28th day of March, 1992, by DONALD S. KLEIN.

Notary Public

My Commission Expires:
My commission expires September 6, 1995